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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

JUDITH JAVA, *et al.*,

Appellees,

—v.—

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, *et al.*,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE EMPLOYMENT PROJECT, CENTER ON SOCIAL WELFARE POLICY AND LAW AS *AMICUS CURIAE*

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Interest of the *Amicus*

Unemployment compensation benefits are a most important source of income for poor persons who become unemployed. The denial of benefits in every instance in which an employer requests an appeal of a determination favorable to an unemployment compensation claimant creates a most difficult problem for such persons by denying them benefits to which they have been determined to be entitled.

The Employment Project of the Center on Social Welfare Policy and Law is funded by the Office of Economic Opportunity. It is charged with assisting Legal Services programs in litigation and other activities which will help make existing law more responsive to the employment needs of the poor. Consistent with this responsibility, the Project has devoted a substantial portion of its efforts to unemployment compensation reform. Primarily through litigation, the Project has concerned itself with procedural and substantive issues concerning the administration of unemployment compensation as it affects the poor.

The procedure followed by the State of California, which was held unconstitutional by the Court below, is also followed in unemployment compensation programs in most other states. It is a policy which results in substantial, repeated, and unnecessary hardships for individual working poor persons in all of these states. Obviously, the ruling in this case will have a substantial impact on their legal rights.

For these reasons, the Employment Project submits this Brief, *Amicus Curiae.*

Consent for the filing of this Brief, *Amicus Curiae,* has been obtained from the parties to this appeal.

Summary of Argument

Goldberg v. *Kelly,* 397 U.S. 254 (1970), held that the Due Process Clause of the United States Constitution requires that welfare benefits not be terminated without prior evidentiary hearings. Recent cases extending this rule to unemployment compensation have been correctly

decided because unemployment compensation, like welfare, is a government-administered benefit program intended by Congress to meet the very real needs of unemployed workers and because benefits are distributed only after an exhaustive investigation to determine eligibility. Further, 42 U.S.C. §503 requires that the method of administration of unemployment insurance programs be reasonably calculated to insure payment of benefits to recipients "when due." The delay in payment occasioned by summary terminations violates this requirement.

ARGUMENT

A.

The automatic suspension of plaintiffs' unemployment compensation benefits without a prior evidentiary hearing violates the due process clause of the Fourteenth Amendment to the United States Constitution.

1. *Goldberg* v. *Kelly* and Similar Cases Require Hearings Prior to Termination of Government Benefit Payments.

In *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), affirming *Kelly* v. *Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968), this Court held that once a determination of eligibility for governmentally administered benefits has been made in favor of a recipient by the concerned state agency, those benefits may not be terminated without a prior evidentiary hearing if uninterrupted receipt of those benefits is of substantial importance to the recipient. Subsequent to *Goldberg*, this Court has indicated that it will consider the constitutional implications of benefit *reductions* without prior hearings, *Daniel* v. *Goliday*, 398 U.S. 471 (1970). Lower courts have

applied the *Goldberg* rule to a number of public benefit programs; see *Escalera* v. *New York City Housing Authority,* 425 F.2d 853 (2nd Cir. 1970) (due process hearing required prior to eviction from public housing or additional rental charges); *Cloud* v. *Dietz,* Civil No. 374 (E.D. Ky. April 22, 1970) (medical assistance); *Harrell* v. *Harder,* Civil No. 13,800 (Conn. April 30, 1970) (all recipients including medical assistance and food stamps); *Merriweather* v. *Burson,* Civil No. 13,630 (Ga., April 22, 1970) (reductions); *Doyle* v. *Finch,* Civil No. SA 69-321 (W.D. Tex. Aug. 10, 1970) (disability payments); *Barnett* v. *Lindsay,* Civil No. 328-69 (Utah, Apr. 2, 1970) (assistance terminations, reductions, delayed original applications); *Wright* v. *Finch,* CA No. 1457-70 (D.D.C. Jan. 6, 1971) (disability insurance); *contra, Messer* v. *Finch,* 314 F. Supp. 511 (E.D. Ky. 1970), *vacated as moot* —— U.S. —— No. 768 (Jan. 11, 1971) (no constitutional deprivation in disability benefit termination because payments continued two months after disability disallowed).

Most importantly, the Three-Judge Court below in *Java* v. *California Department of Human Resources Development,* 317 F. Supp. 875 (N.D. Cal. 1970), and a Single-Judge Court in *Crow* v. *California Department of Human Resources,* C-70 1128 ACW (N.D. Cal. Oct. 12, 1970), have applied *Goldberg* to unemployment compensation. One Federal Court, the Southern District of New York, has refused to follow these cases. *Torres* v. *New York State Department of Labor,* 70 Civ. 2408 (S.D.N.Y. January 7, 1971) (Judge Lasker concurring and dissenting).

Prior to *Goldberg* this Court applied constitutional protections to the administration of government benefits in many situations: *Sherbert* v. *Verner,* 374 U.S. 398 (1963), prohibited the infringement of religious freedom as a con-

dition of unemployment compensation and *Slochower* v. *Board of Higher Education,* 350 U.S. 551 (1956), established that due process protects public employment even though there is no constitutional right to such employment. This Court also applied due process protection to private litigation involving current income: *Sniadach* v. *Family Finance Corp. of Bay View,* 395 U.S. 337 (1969), held that a creditor could not deprive a wage earner of current income by use of garnishment without a prior hearing. Additionally, *Dixon* v. *Alabama State Board of Education,* 294 F.2d 150 (5th Cir.), *cert. den.* 368 U.S. 930 (1961), applied due process protection to enrollment in public schools. In fact, the cases in this area have assumed that prior due process hearings were the norm and that only in certain carefully limited circumstances could there be an exception to that norm. See *Goldberg* v. *Kelly,* 397 U.S. 254, 263 fn. 10 (1970); *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U.S. 886, 896 (1961) (government's unfettered control of military installations justified the exception); *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594 (1950) (protection of consumer from mislabeling justified the exception); *Bowles* v. *Willingham,* 321 U.S. 503 (1944) (immediate regulation of wartime rentals justified the exception); *Phillips* v. *Commissioner of Internal Revenue,* 283 U.S. 589 (1931) (government interest in unpaid corporate taxes justified the exception). The rationale of these cases makes it clear that *Goldberg, supra,* applied the traditional rule.

As was noted by the Three-Judge Court below, unemployment compensation is indistinguishable from the welfare programs before the Court in *Goldberg.* 317 F. Supp. 875, 878. Unemployment compensation is (1) a government

benefit program (operated in this case by the State of California) under which (2) current receipt of benefit payments is of extreme importance to recipients and (3) exhaustive initial determinations of eligibility for continuing benefit payments are made.

2. Unemployment Compensation Is a Government Benefit Program.

In upholding the validity of the federal unemployment compensation program, the Supreme Court made it clear that unemployment compensation is a government benefit program. *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). See also *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937).

A review of the structure and administration of unemployment compensation raises no doubts concerning this conclusion. Unemployment compensation is paid from a fund created by federal (26 U.S.C. §§3301 *et seq.*) and state taxing powers (Cal. Unempl. Ins. Code, §§901-1176; N.Y. Lab. L. §§550-562). The state collects the tax (Cal. Unempl. Ins. Code §101; N.Y. Lab. L. §570); determines eligibility for benefits (Cal. Unempl. Ins. Code §§1251-1254; N.Y. Lab. L. §§590, 591); pays benefits (Cal. Unempl. Ins. Code §§1326, 1339; N.Y. Lab. L. §590); recovers overpayments (Cal. Unempl. Ins. Code §§1375, 1379; N.Y. Lab. L. §594); and prosecutes those who receive benefits fraudulently (Cal. Unempl. Ins. Code §2101; N.Y. Lab. L. §632).

The employers' concern with unemployment compensation, in contrast, is minimal. That interest is precisely the same as the interest of any taxpayer group composed of less than the entire public. An employer pays a tax rate which is partially determined by the amount paid from the

fund to his former employees but this experience rated tax is never increased because of an erroneous payment (such as might be made while an appeal is pending). Cal. Unempl. Ins. Code §§1027, 1032; N.Y. Lab. L. §577(1)(b)(4). If Plaintiffs prevail before this Court, it is possible that there will be a slight general increase in unemployment compensation rates, but that increase would bear equally on all employers.

An employer has less interest in a general unemployment compensation tax increase than a creditor has in money he has loaned. But in *Sniadach* v. *Family Finance Corp. of Bay View, supra,* this Court held that a wage-garnishment statute was unconstitutional because it did not provide for a hearing prior to the garnishment. The Court relied largely on the fact that the statute deprived the debtor of his source of money for current living expenses. 395 U.S. 337, 340. It was made clear, even in purely private litigation, that one may not be deprived of current income necessary to meet day-to-day living expenses without a prior due process hearing. The implication, particularly in light of *Goldberg,* is that a governmentally administered program designed to maintain current income [See S. Rep. No. 628, 74th Cong. 1st Sess. 10-13 (1935) (hereafter referred to as "S. Rep.")], cannot permit a deprivation of income without a prior hearing merely because it may potentially result in some increase in the general tax rate imposed on the taxed segment of the population. This is precisely the situation in unemployment compensation—it is possible that the general tax rate imposed on all employers will increase as a result of increased expenses, but individual employers have no more specific interest in such an increase than has a property owner in a legislatively imposed property tax increase.

Unemployment compensation, quite simply, is a government taxation and benefit distribution program which affects employers uniquely only insofar as they, for reasons of economic policy, are the taxed portion of the population.

3. Unemployment Insurance Benefits Meet Current Economic Needs of Recipients.

In the State of New York in the year 1967 more than 40% of the recipients of unemployment compensation earned less than $3000 in their base period (the year prior to application for unemployment insurance) and more than 70% earned less than $5000. New York State Department of Labor, *Unemployment Insurance Beneficiaries* (March, 1970). Even the maximum New York State unemployment benefit of $75.00 per week is obviously used by people with such low incomes to meet day-to-day living expenses.* It was precisely this type of hardship, imposed by deprivation of income necessary to meet such expenses, which led this Court in *Goldberg* to note:

> "The same governmental interests which counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end." 397 U.S. 254, 265.

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* In the Brief of Appellants at 22, it is urged that the fact of lower unemployment insurance payments for persons with lower salaries in their previous employment indicates that need is not relevant in unemployment insurance. This overlooks the fact that unemployment insurance pays a higher percentage of the lower salaries than of higher salaries. See, Cal. Unempl. Ins. Code §§1275, 1280, 1281, N.Y. Lab. L. §590. Further, the fact that there is a minimum amount of earnings required before one is eligible for unemployment insurance does not indicate that need is not relevant in unemployment insurance, but rather that Congress has decided that those without attachment to the work force should have their needs met by a program other than unemployment insurance.

Similarly, in *Sniadach*, this Court said:

> "A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support." 395 U.S. 337, 340.

Notwithstanding the authority of *Sniadach*, with its emphasis on the importance of current income to meet living expenses, the majority in *Torres* v. *New York State Department of Labor*, 70 Civ. 2408 (S.D.N.Y. Jan. 7, 1971) said:

> "In the absence of 'brutal need' on which the court rested its decision in *Goldberg*, the governmental interests to which the Court referred [referring to *Escalera* v. *New York City Housing Authority*, 425 F.2d 853, 807 (1970)] must be held to outweigh plaintiffs' claim." Slip Opinion, p. 12.

In his dissent Judge Lasker took issue with this conclusion:

> "I differ with my brothers in that I cannot conclude as easily as they that a beneficiary of unemployment compensation whose payments are terminated does not fall within the category of 'brutal need.'" Slip Opinion, Concurrence and Dissent, p. 1.

In the case at bar, of course, the Court below specifically found the requisite need. Perhaps even more to the point, there is really no reason to think that one's need must be "brutal" before the traditional constitutional protections enjoyed by an American citizen when he deals with his government are brought into play. In this connection the remarks of Judge Wollenberg in *Crow, supra*, are in point:

> "The State argued in *Java*, as the Federal government argues here, that the controlling factor in *Goldberg*

was the 'brutal need' which characterizes the case of the typical welfare recipient.

• • • • •

"Defendants conclude with the argument that since Mrs. Crow does not lack 'the very means to live' she is not entitled to 'the extraordinary remedy of a pre-determination hearing . . . .'

"Defendants misread *Java, Goldberg,* relevant California statutes, and the recent history of American jurisprudence. . . . The Supreme Court invoked the 'brutal need' of the welfare client, not to give him special rights not enjoyed by others, but as part of the balancing process which had been employed in previous due process cases . . . ." Slip Opinion, pp. 8-9.

In other words there is no absolute test of brutal need, but rather there is a balancing of individual needs against government interest. The *Torres* majority, in the above quote, came quite close to adopting an absolute test when it said that in the absence of brutal need the governmental interests outweighed Plaintiffs' claim.

The *Torres* majority found inadequate need for two reasons: (1) eligibility for unemployment compensation is not, as a matter of legislative policy, based on a determination of need, Slip Opinion, p. 11, and (2) recipients denied unemployment compensation may qualify for welfare, Slip Opinion, p. 11. As to the former rationale, the Court below correctly found unemployment compensation recipients to be actually "needy." 317 F. Supp. 875, 878. Moreover, and contrary to the *Torres* majority's position, unemployment compensation, like welfare, was designed to meet this need. H. Rep. No. 615, 74th Cong. 1st Sess. 7-9 (1935). The

absence of a need test in unemployment compensation does not mean that unemployment benefits were not intended to meet actual current needs; this conclusion follows inevitably from the House and Senate Committees' references to the importance of unemployment benefits as an *alternative* to welfare. H. Rep. at 7; see also, S. Rep. at 10-13. Congress intended to remove the psychologically debilitating necessity of reliance on welfare for those regularly attached to the work force. 79 Cong. Rec. 5468 (1935). The very need which required welfare required its alternative, unemployment compensation:

> "It is sometimes said that unemployment insurance is not based on need. Stated thus, without qualification, the proposition contains a grave error. Unemployment insurance is a compulsory governmental program, and in our society we make use of governmental compulsion only when there is a clear and urgent need for it.
>
> • • • • •
>
> "If in 1935 we had not judged that there existed a need which individuals were incapable of meeting by themselves, unemployment insurance would not have been established . . . ." Becker, *The Adequacy of Benefits in Unemployment Insurance* in *In Aid of the Unemployed*, 80-81 (Becker ed. 1965).

In unemployment compensation, need is presumed from the fact of unemployment. Its reality is made clear by the poverty-level income of recipients, as reflected in statistics such as those from New York State, see *supra*, p. 8.

The availability of welfare is not an adequate response to this need. The availability of welfare is not so simple a

matter as the *Torres* majority supposed. If a father remains in the home with his family, the family would not be eligible for any federally-assisted welfare payments in twenty-seven states because they do not have the optional Aid to Families with Dependent Children—Unemployed Parent program (see 42 U.S.C. §607) which provides for federal reimbursement for such payments. United States Department of Health, Education and Welfare, *Public Assistance Statistics, July 1970* at Table 8. Similarly, persons without children who are not blind, disabled or aged would not be eligible for federally-assisted programs in any state. See 42 U.S.C. §§301 *et seq.*, 401 *et seq.*, 601 *et seq.* and 1201 *et seq.* Such persons would be thrown back on their resources, however meager, unless they could convince their welfare departments that they qualified for the state or county general or emergency assistance programs. These programs, however, offer only the most haphazard assistance:

> "General Assistance is the last operating vestige of the poor laws in Public Assistance. Since the funds for this program come from local sources, for the most part, and since the local administering body can set the rules within very broad, if any, State legal limits, there is a marked absence of broad social purpose in the programs.
>
> "This type of aid often is the only resource for many temporarily or permanently unemployable persons and persons out of work who cannot qualify for Unemployment Insurance or whose benefits under that program are inadequate or have been exhausted. However, 4 States will not pay General Assistance to a family with an employable person in the household except in certain dire emergencies.

"State and local GA programs are generally more limited than the Federally aided assistance programs as to the duration and the amount of assistance paid. In 12 States, only emergency or short term assistance is given; in 14 States, aid is restricted to defined special situations. In addition, six States limit the length of time an eligible person can get General Assistance. In many others limitations are set from time to time because of limitations on available funds. A maximum is set on the amount of General Assistance that can be given to a needy person in 14 States. Average monthly payments for all the States reporting in April 1968 amounted to $45 monthly per recipient (ranging from $3.70 in Arkansas to $75 in Pennsylvania). Money payments are made in only about one-half of the State programs; the remaining use either vendor payments or both cash and vendor payments." President's Commission on Income Maintenance Programs (Heineman Commission, appointed 1968), *Background Papers* (1969) at 279 (hereafter cited as *Background Papers*).

Since employability is a requirement of eligibility for unemployment compensation, persons found ineligible for unemployment insurance for reasons other than unemployability would not be able to obtain general assistance in the four states to which the Commission refers in the second paragraph. Apparently New Mexico now has no general assistance program whatsoever. See *New Mexico ex rel. Johnson* v. *Goodwin*, C.A. 42552 (Dist. Ct. Santa Fe Cty. Complaint filed Dec. 2, 1970). The difficulty with relying on state supported general assistance to meet the needs of unemployment compensation recipients pending a hearing

is highlighted by the following comment on the California general assistance program as it existed in 1962:

> "Income not present but forthcoming, *e.g.*, during a penalty period under Unemployment Compensation, will render an individual ineligible." *Background Papers* at 282.

In other words many persons awaiting unemployment compensation hearings were specifically excluded from general assistance. The Heineman Commission concluded:

> "While the AFDC-UP program and the General Assistance program in some localities can supplement the income of families headed by employable men, in practice most are excluded by stringent asset tests and the nonfinancial eligibility requirements imposed." President's Commission on Income Maintenance Programs, *Report (Poverty Amid Plenty, The American Paradox)* at 124 (1969).

Even assuming the availability of some form of public assistance to those whose unemployment compensation is terminated, it should not be used to finance the unemployment insurance hearing process. Congress enacted a comprehensive Social Security Act in 1935 which was intended to meet the minimal economic needs of American citizens and particularly those rendered destitute by the Depression of 1929. See generally, Altmeyer, *The Formative Years of Social Security* (1966) at 3-42. As part of that act Congress determined that those persons who were regularly attached to the work force but deprived of current income by reason of unemployment should be assisted with pay-

ments from an employer-financed program of unemployment compensation. To urge that other federal or state welfare programs should be used to meet the needs of these people while their unemployment compensation is terminated pending a hearing is to force the federal and state governments to finance unemployment compensation from general revenues rather than from the employer tax, contrary to Congressional intent.

To finance unemployment insurance hearings from welfare funds is also administratively inefficient and unduly burdensome to the recipient. It is administratively inefficient because it forces two government agencies to make decisions as to eligibility for benefits before it allows those benefits to vest so that they continue uninterrupted until there is a due process hearing. It would seem much simpler to require uninterrupted unemployment insurance payments pending a hearing. This would also have the effect of requiring that due process requirements in unemployment compensation be financed from unemployment insurance funds rather than from welfare funds. Financing unemployment insurance hearings with welfare also burdens the recipient by forcing him to make applications for welfare benefits which he desperately needs before a final determination of his eligibility for unemployment compensation has been made.

4. Entitlement to Unemployment Benefits Is Determined by an Initial Determination of Eligibility Which Extends to the Employers All That Due Process Requires.

In California entitlement to unemployment benefits is determined as an initial matter on the basis of an exhaustive investigation of all sources of information, including

the employer. See Cal. Unempl. Ins. Code §§1327 *et seq.* As the Three-Judge Court below noted, the investigation procedure prior to a determination provides ample opportunity for the claimant's previous employer and any other interested person to present facts which may affect the claimant's eligibility for benefits. 317 F. Supp. 875, 877-878.

Copies of certain forms completed by the unemployment compensation claimant are sent to his previous employer for verification, and the employer is bound to submit, within ten days, "any facts then known which may affect the claimant's eligibility for benefits." Cal. Unempl. Ins. Code §1327. If the employer raises an issue as to eligibility the claimant may then be asked to complete an additional form which asks for more detailed information about the termination of the claimant's job. The investigation does not stop here, however. According to the Local Office Manual used in California, the employment interviewer has the duty "to seek from any source the facts required to make a prompt and proper determination of eligibility." L.O.M. §1400.3. At the Eligibility Rights Interview with the claimant, the employment interviewer is *required* to "make telephone contact with other parties" in order to verify the representation of the claimant. L.O.M. §1404.4. If the "other parties" cannot be contacted at the time of the Interview, they are to be contacted thereafter by letter for verification. L.O.M. §1404.4. Additionally, all interested persons must be permitted to "'contradict, refute, or explain any evidence [which is relevant]." L.O.M. §1404.4. After the Interview with the claimant, the actual decision may be suspended for an additional ten days to get further information. L.O.M. §1400.3. If the claimant has given any evidence which is "adverse to his [the employer's] interests," the

employer must be offered an opportunity to "contradict, refute, or explain" that evidence. L.O.M. §1400.5. Additionally, if the employer's information "does not clearly resolve [any] issue, [the employer] must be given an opportunity to provide additional information." L.O.M. §1400.5.

Having completed this extensive investigation, the employment interviewer then considers the evidence and makes a determination as to eligibility. The Department itself proclaims that this "determination is the point at which any issue affecting the claimant's eligibility is decided." L.O.M. §1400.1.

The employer is afforded every opportunity to submit evidence and to contradict any evidence submitted by the claimant. The thoroughness of this employer-oriented investigation illustrates the necessity for the claimant to be heard before the decision based on that investigation is subsequently modified.

Despite the initial determination of eligibility, a subsequent employer appeal within ten days automatically suspends benefits.* There is no adequate policy justification for this suspension. As noted above, the employer is in no way harmed, even by erroneous payments. The recipient, however, is usually desperately in need of income; without it he suffers tremendous hardship.

By requiring prior termination hearings, there may arise some administrative inconvenience and additional expense. But such an effect is not insurmountable. This

*The time for filing an appeal varies from state to state. In New York a much longer period of 30 days is allowed. N.Y. Lab. L. §620(1).

is adequately demonstrated by the successful implementation of the Rhode Island unemployment compensation statute which requires that an eligible claimant's benefits *not* be suspended when an employer appeals. See Gen. Laws of R. I. 28-44-40 (1968). And, of course, administrative convenience and additional expense alone cannot justify the deprivation of important constitutional rights. *Goldberg* v. *Kelly, supra* at 265-266.

B.

The automatic suspension of plaintiffs' unemployment compensation benefits after an initial determination of eligibility violates controlling provisions of Federal law.

1. The Automatic Suspension of Benefits Pending Appeal Does Not Result in Payment of Benefits "When Due" as Required by 42 U.S.C. §503(a)(1).

The Court below found the California practice of benefit suspension to violate the United States Constitution by not providing prior hearings *and* to violate 42 U.S.C. §503(a)(1) by not providing benefits when due. 42 U.S.C. §503 provides:

> "(a) The Secretary of Labor shall make no certification for payment [of federal funds for administration of state unemployment statutes] to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for—
>
> (1) Such methods of administration . . . as are found by the Secretary of Labor to be *reasonably calculated to insure full payment of unemployment compensation when due; . . .*"
>
> 42 U.S.C. §503(a)(1) (emphasis supplied).

The Court below found that the median delay between an employer appeal and the resumption of benefit payments is seven weeks and that this delay violated the statutory requirement of payment "when due."* In view of the holdings in recent cases and of the legislative history of unemployment compensation, the Court below was correct.**

Welfare programs based on federal statutes which require the payment of benefits to eligible individuals create statutory "entitlements" in favor of the eligible. *Goldberg* v. *Kelly, supra; Shapiro* v. *Thompson,* 394 U.S. 618, 627 n. 6 (1969); *King* v. *Smith,* 392 U.S. 309 (1968). Numerous cases have followed the decisions of this Court and found a statutory entitlement to welfare based on 42 U.S.C. §602 (a)(10) (Supp. V 1965-69), which provides that a state welfare plan must "provide . . . that aid . . . shall be furnished with reasonable promptness to all eligible indi-

* The situation in California is not unique. For example, for the period July to September, 1969, in New York, more than thirty days elapsed between the hearing demand and actual hearing in 98% of the cases; and 73.2% of the cases involved delays in excess of forty-five days. See United States Department of Labor, *Unemployment Insurance Statistics* (1969) at Table 17.

** The Three-Judge court in *Torres* v. *New York State Department of Labor,* 70 Civ. 2408 (S.D.N.Y. January 7, 1971) concluded that New York's practice did not conflict with 42 U.S.C. §503(a)(1) despite the absence of prior hearings. This holding was based solely on the finding of the United States Secretary of Labor that New York's practice complies with the requirements of federal law. While such administrative interpretations are entitled to serious consideration, *Lewis* v. *Martin,* 397 U.S. 552, 559 (1970) (state regulation invalid because in direct conflict with specific federal regulation), the general approval by a federal administrator of a state plan does not confer any immunity to legal challenge or curtail judicial scrutiny and relief. *Rosado* v. *Wyman,* 397 U.S. 397, 420 (1970).

viduals." See, *Cooper* v. *Laupheimer*, 316 F. Supp. 264 (E.D. Pa. 1970) (state cannot reduce welfare grants to make up for past overpayments); *Doe* v. *Shapiro*, 302 F. Supp. 761 (D. Conn. 1969) (state cannot deny benefits to illegitimate children because mother refuses to reveal name of putative father); *Damico* v. *California*, No. 46,538, CCH Pov. L. Rep. ¶10,748 (N.D. Cal., Sept. 12, 1969) (state cannot impose three month waiting period prior to welfare payments). The similarity between 42 U.S.C. §602(a)(10) and 42 U.S.C. §503(a)(1) is immediately apparent. One can only conclude that §503(a)(1) creates a similar entitlement and that payments must be made once a claimant is initially determined to be eligible.

The legislative history of unemployment compensation leads to the same conclusion. Unemployment compensation was not intended to provide an unlimited amount of compensation to all who are unemployed. "Any attempt to make it do so confuses unemployment compensation with relief, which it is designed to replace in large part. It can give compensation only for a *limited period* and for a percentage of the wage loss." *H. Rep.* at 7 (emphasis supplied). See also, *S. Rep.* at 10-13. Compensation is made available for a limited period on the assumption that the worker, with the support of his benefits, will seek and find new employment during the period in which he is receiving benefits, and that once he achieves his goal, unemployment compensation is no longer necessary. The crucial period, therefore, in which the immediate need for compensation arises, and at which the Act is directed, is the period of unemployment. This is when unemployment compensation is "due" under Section 503(a)(1) of the Act. It is clear that retroactive payment of benefits after a hearing, which

may be held *after* new employment is obtained, does nothing to secure this purpose.

Congress also passed the Act to "enable most workers who lose their jobs to tide themselves over, until they get back their old work or find other employment *without* having to resort to relief . . ." *H. Rep.* at 7 (emphasis supplied). To insure that unemployed workers will not be required to resort to welfare, it is essential that state procedures provide for the payment of unemployment compensation benefits during the initial stage of unemployment. The California procedure here at issue offers no such protection.

Unemployment compensation was viewed by the Congress as a right. The legislative history of the federal provisions clearly reflects the idea that unemployment compensation was *not* considered charity:

> "The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of our population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief." 79 *Cong. Rec.* 5468 (1935).

As in welfare cases we deal with a "statutory entitlement." In order to protect this entitlement to unemployment compensation, 42 U.S.C. §503(a)(1) requires state procedures "to be reasonably calculated to insure full payment of unemployment compensation when due." Cali-

fornia's practice is not in conformity with this standard. Plaintiffs were ruled eligible for their statutory entitlements by the Department when they were unemployed. This was the time during which Congress intended benefits to be paid. The California practice of automatic suspensions for an average of seven weeks whenever an employer requests an appeal prevented receipt of those benefits during a substantial portion of the time the recipients were unemployed and it conflicts with this clear congressional intent.

2. There Is a Federal Court Remedy for Persons Aggrieved by Violations of the Social Security Act by the State of California.

As noted above, it is now settled that welfare recipients may challenge the administration of local welfare programs which violate the Federal Social Security Act. See, *supra,* pp. 19-20. Unemployment compensation is part of that Act. For present purposes, it is identical to welfare: There is a federal statute with which the state programs must conform, 42 U.S.C. §503(a), and there is a provision for the holding of hearings to determine whether or not the state program is in conformity with the federal statute. Compare 42 U.S.C. §503(b) and (c) with 42 U.S.C. §604(a). In *Rosado* v. *Wyman,* 397 U.S. 397 (1970) this Court dealt with an identical situation. The state defendant urged that the conformity hearing was the sole method of testing the adequacy of its welfare program. This Court specifically addressed this issue saying:

> "We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds

by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." 397 U.S. 397, 420.

The Court below correctly reached the same result for unemployment compensation.

CONCLUSION

For the foregoing reasons, the decision of the Court below should be affirmed.

Respectfully submitted,

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